

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Todd M. Rogers,

Chapter 7

Debtor(s).

BK 04-31076 GFK

NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE

TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion at 2:00 P.M. on June 21, 2004, in Courtroom No. 228 B, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than June 16, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than June 10, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: _____

CLERK OF BANKRUPTCY COURT

By: _____
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Todd M. Rogers,

Chapter 7

Debtor(s).

BK 04-31076 GFK

NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)

TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 2:00 P.M. on June 21, 2004, in Courtroom No. 228 B, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than June 16, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than June 10, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1. UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding

is a core proceeding. The petition commencing this Chapter 7 case was filed on February 25, 2004. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtor, it appears that he has the ability to pay a substantial portion of his dischargeable debt without hardship.

7. The debtor lists the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtor lists three claims totaling \$ 489,000.00 secured by 2001 Maxim boat and boat slip and a first and second mortgage on the homestead.
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtor lists no claims.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtor lists ten claims totaling \$ 87,050.00.

8. The debts listed in the debtor's Schedule of Liabilities appear to be primarily consumer debt. *See* Debtor's Schedule F. The debtor checked on the Petition that the nature of the debts are consumer/non-business.

9. On Schedule I, the debtor lists monthly net income of \$ 8,950.00. The debtor is married and lists two minor aged dependents. On April 9, 2004, the United States Trustee wrote to the debtor for additional financial information. *See* Att. Ex. 1. The debtor timely responded on May 14, 2004. *See* Att. Ex. 2 (without attachments).

Based on the pay stub of Todd M. Rogers^{1/}, for pay period ending 4/15/04, he has the following net income:

YTD Gross	\$ 47,896.70
Less YTD	
Fed.	(7411.53)
Soc. Sec.	(2781.27)
Medicare	(650.46)
MN State	(2235.55)
Health	(1342.21)
Dental	(235.60)
Life	(54.40)
Accounts Rec	(1281.14)
Pro	(130)
Flex	(500)
Dep Care	(829.72)
Demo Allow	(200)
Other Ded	(890)
YTD Net Income	\$ 29,354.82 ^{2/}

^{1/}For security, the pay stubs are not attached to avoid dissemination of sensitive information on the internet. Upon request, the U.S. Trustee can provide a copy of these documents to counsel for the debtor (if a copy was not retained) or the chapter 7 trustee and may submit the pay stubs at any hearing.

^{2/}This figure does not include voluntary reductions for 401K. Voluntary contributions to retirement/pension accounts are not reasonable or necessary expenses for determining disposable income and that said contributions should be reflected in the calculation of disposable income. See e.g. *In re Harshbarger*, 66 F.3d 775 (6th Cir.1995) (adopting per se rule that voluntary contributions into 401K account are disposable income for Section 1325 purposes); *In re Anes*, 195 F.3d 177 (3rd Cir.1999) (adopting per se rule that voluntary contributions to retirement plan constitute disposable income under Section 1325) *In re Taylor*, 243 F.3d 124 (2d Cir.2001) (adopting a case by case test to look at the age of the debtor, the mandatory nature of the contributions and impact on employment, dollar amount of any penalties, and other circumstances); *In re Delnero*, 191 B.R. 539, 542 (Bankr. N.D.N.Y. 1996); *In re Cornelius*, 195 B.R. 831 (Bankr. N.D.N.Y. 1995); *In re Cavanaugh*, 175 B.R. 369, 373 (Bankr. D. Idaho 1994); *In re Scott*, 142 B.R. 126, 135 (Bankr. E.D. Va. 1992) (not reasonably necessary under §1325(b)); *In re Fountain*, 142 B.R. 135, 137 (Bankr. E.D. Va. 1992) (cannot make voluntary contribution unless pay Ch. 13 creditors in full); *In re Ward*, 129 B.R. 664, 668 (Bankr. W.D. Okla. 1991); *In re Colon Vazquez*, 111 B.R. 19, 20 (Bankr. D. Puerto Rico 1990); *In re Festner*, 54 B.R. 532, 533 (Bankr. E.D.N.C.

\$ 29,354.82 divided by 7th pay period = \$ 4,193.54 average per pay period x 24 annual periods =
\$ 100,645.09 divided by 12 months = \$ 8,387.09 average net pay per month.

10. On Schedule J, the debtor lists monthly expenses of \$ 6,225.00. The debtor lists boat payment of \$ 1,300.00 and boat insurance of \$ 100.00 per month. A boat is not reasonable or necessary for the support of the debtors and the boat payment and insurance expense should be eliminated.

The debtor lists health insurance payment of \$ 350.00 per month. The debtor's health insurance is deducted from the debtor's pay stub and is not a separate monthly expense and should be eliminated.

The debtor lists day care expenses of \$ 780.00 per month. The debtor submitted receipts for period January - March 2004 which averaged \$ 580.67 per month. This expense should be reduced by \$ 200.00.

Adjusted Schedule expenses are \$ 4,275.00.

11. Average net monthly income of \$ 8,387.09 less monthly expenses of \$ 4,275.00 provides the debtor with monthly disposable income of \$ 4,112.09.

12. Monthly disposable income of \$ 4,112.09 is more than enough for the debtor to pay the unsecured creditors in full in a hypothetical thirty six month Chapter 13 plan with monthly payments of \$ 2,418.05.

13. The debtor is currently employed, and there does not appear to be any likelihood that his employment will be terminated at any time in the future.

1985); *In re Harshburger*, 66 F.3d 775, 777 (6th Cir. 1995) (Ch 13 case: not necessary for maintenance or support); *Collins v. Hesson (In re Hesson)*, 190 B.R. 229, 237-38 (Bankr. D. Md. 1996).

14. The debtor has the ability to repay a substantial portion of his general unsecured debt and there appears to be no reason for his unwillingness to do so.

15. As an alternative to dismissal, the United States Trustee does not oppose voluntary conversion of this case to Chapter 13.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be dismissed.

Dated: June 1, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500



U. S. Department of Justice

Office of the United States Trustee

*Districts of Minnesota, North Dakota,
South Dakota and Iowa*

U.S. Courthouse, Suite 1015

300 South Fourth Street

Minneapolis, MN 55415

612 / 664-5500

FAX 612 / 664-5516

April 9, 2004

Harvey James Radke
1401 W. 76th Street, Suite 400
Richfield, MN 55423

Re: *Todd M. Rogers*, Bankr. No. 04-31076

Dear Mr. Radke:

As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. § 707(b). There is incomplete information in the above named case for our office to complete its investigation of this case. Please provide **copies** of the following information on or before May 14, 2004.

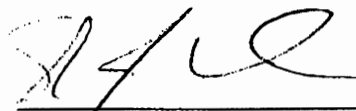
1. Copies of last three pay stubs for the debtor and for non-filing spouse.
2. Copies of the 2001, 2002 and 2003 state and federal tax returns, including attachments (W-2s).
3. Provide any documentation showing that any reduction for retirement is mandatory (if nothing is submitted, the United States Trustee shall assume that it is a voluntary contribution).
4. Copies of check stubs or receipts for last three months of life insurance expenses. Is the insurance policy whole or term insurance?
5. Copies of check stubs or receipts for last three boat and slip payments. Provide copy of purchase agreement.
6. Copies of check stubs or receipts for last three months of health insurance, if not included in pay stubs.
7. Copies of check stubs or receipts for last three months of boat insurance.
8. On whose behalf are the support payments of \$ 1,250.00 and " 1/2 child's exp./divorce decr. payments or \$ 200.00 per month? Provide copy of divorce decree or Court Order setting forth amount of obligations. Is the payment for alimony for the non-filing spouse listed on Schedule I? Please clarify.

9. Copies of check stubs or receipts for last three months of day care expenses.
10. Copy of home equity loan agreement.
11. Copies of bank statements and checking and savings accounts and copies of corresponding check registers for period September 2003 - February 2004.

Please call if you have a question or concern about this letter.

Sincerely,

HABBO G. FOKKENA
UNITED STATES TRUSTEE

A handwritten signature in black ink, appearing to read 'S. J. Wencil', written over a horizontal line.

Sarah J. Wencil
Trial Attorney

cc: Todd M. Rogers
Michael J. Iannacone, Chapter 7 Trustee



RADKE LAW OFFICE

Harvey J. Radke

Attorney at Law

105 Riverdale Drive

Hastings, MN 55033

Phone: **(651) 438-2783**

Ms. Sarah Wencil
U.S. Dept. of Justice
300 S. 4th ST.
Suite 1015
Minneapolis, MN 55415

May 14, 2004

Re: Todd Rogers
Bky. No. 04-31076

Dear Ms. Wencil:

Pursuant to your request, please find enclosed:

- 1) The most recent pay stubs for Mr. Rogers and his wife, Vicki. They are currently separated and a divorce is expected. Vicki Rogers has been unemployed since March 22, 2004.
- 2) Copies of Mr. Rogers' 2001, 2002, and 2003 state and federal tax returns, including w-2s.
- 3) Retirement withholding is not mandatory. Enclosed is a copy of the retirement account statement.
- 4) The life insurance is whole life, and is deducted from his employer.
- 5) The boat and slip payments were made electronically from Mr. Rogers' US Bank Christmas Fund account, see the US Bank statements.
- 6) See Mr. Rogers' pay stubs for insurance withholdings.
- 7) See enclosed American Family check receipts.
- 8) Enclosed are the January, 2000 Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree from Todd Roger's previous marriage to Lynette Rogers. Child support is for the benefit of Alyssa Marie Rogers, age 8, see page 5. The payment is not for alimony and/or support for Mr. Rogers' current wife, Vicki, nor his son Colton Rogers. Mr. Rogers will have additional child support obligations for his son Colton.

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2004 MAY 14 A 9:04
OFFICE OF UNITED
STATES TRUSTEE

- 9) Enclosed please find receipts for day care expenses for Colton. Mr. Rogers does not have receipts for the additional baby sitting expenses incurred monthly in addition to day care.
- 10) Enclosed please find the Guaranty Home Equity Corp. agreement.
- 11) Enclosed please find Todd Rogers' bank statements for US Bank. Mr. Rogers does not maintain a check register.

Cordially,

A handwritten signature in black ink, appearing to read "H. J. Radke", written in a cursive style.

Harvey J. Radke
enclosures

VERIFICATION

I, Sarah J. Wencil, trial attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: June 1, 2004

Signed:

/s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Todd M. Rogers,

Chapter 7

Debtor(s).

BK 04-31076 GFK

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

The United States Trustee submits this memorandum in support of his motion to dismiss this case under 11 U.S.C. § 707(b). *See* Local Rule 9013-2(a).

Analysis

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make charitable contributions (that meet the definition of ‘charitable contribution’ under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4).

11 U.S.C. § 707(b) (1994) (as amended by Religious Liberty and Charitable Donation Protection Act of 1998). The United States Trustee bears the burden of showing substantial abuse. *In re Dubberke*, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

(1) The Debtor's Debts Are Primarily Consumer Debts.

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debts listed on Schedule F are primarily consumer debts. The debtor checked on the Petition that the nature of the debts are consumer/non-business.

(2) The Granting of Relief under Chapter 7 Constitutes Substantial Abuse of Chapter Seven of the Bankruptcy Code.

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988); *United States Trustee v. Harris*, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829,

831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

While bad faith on the part of the debtor may constitute substantial abuse under Section 707(b), bad faith is not required to be shown to satisfy the "substantial abuse" standard when the debtor is otherwise able to repay his or her debts out of future income:

This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

Walton, 866 F.2d at 985 (quoting *In re Kelly*, 841 F.2d at 914-15); *Harris*, 960 F.2d at 76 (stating that "egregious behavior" by the debtor is not a necessary element for a Chapter 7 case to be dismissed under Section 707(b)). While the unique hardships and the good faith of the debtor are relevant factors, those factors are not as important as the ability of the debtor to fund a Chapter 13 plan. *Walton*, 866 F.2d at 983; *see also Harris*, 960 F.2d at 77 (rejecting the "totality of the circumstances" test espoused by the Fourth Circuit Court of Appeals in *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991), in favor of examining whether a debtor may fund a Chapter 13 plan out of future income).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not a relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13 petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the

amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In the District of Minnesota, there is no set percentage of repayment that must be met for substantial abuse to be present. The District Court of Minnesota opines that the determination of what is substantial should be made on a case-by-case basis:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See *Walton*; *Fonder*; see also *In re Schmidt*, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a *de novo* review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

Mathes v. Stuart (In re Mathes), Civil File No. 3-96-906, slip op. at 6-7 (D. Minn. July 2, 1997)
See also In re Shirley Wilkins, 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997) (Kishel, J.)
(holding that the ability to pay 28% in three years or 49% in five years of unsecured debts was a substantial abuse under § 707(b)).

In the present case, the debtor has the ability to pay the unsecured creditors in full in a hypothetical thirty six month Chapter 13 plan with monthly payments of \$ 2,418.05. The ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: June 1, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Todd M. Rogers,

Chapter 7

Debtor(s).

BK 04-31076 GFK

CERTIFICATE OF MAILING

I, Emily Rohr, certify under penalty of perjury that I am an employee in the Office of the United States Trustee for the District of Minnesota and am a person of such age and discretion as to be competent to serve papers.

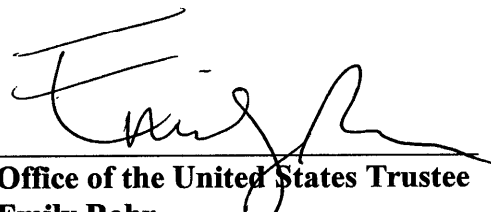
That on June 1, 2004, I served a copy of the Proposed Notice of Hearing, Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law in Support of Motion to Dismiss; and proposed Order in the above-referenced case by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

Addressee(s):

Harvey James Radke
1401 W. 76th Street, Suite 400
Richfield, MN 55423

Michael J. Iannacone
8687 Eagle Point Boulevard
Lake Elmo, MN 55042

Todd M. Rogers
15571 Brookside Lane NW
Prior Lake, MN 55372



**Office of the United States Trustee
Emily Rohr**

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Todd M. Rogers,

Chapter 7

Debtor(s).

BK 04-31076 GFK

ORDER

At St. Paul, Minnesota, this _____ day of _____, 2004, the United States Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) came before the Court for hearing.

Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

IT IS HEREBY ORDERED:

That the Chapter 7 bankruptcy case filed by the above-captioned debtor is dismissed pursuant to 11 U.S.C. Section 707(b).

The Honorable Gregory F. Kishel
United States Bankruptcy Judge